



realitycheck

seventeen million reasons
low-wage workers need strong
protections from harassment

ABOUT THE CENTER

The National Women's Law Center is a non-profit organization whose mission is to expand the possibilities for women and girls by working to remove barriers based on gender, open opportunities, and help women and their families lead economically secure, healthy, and fulfilled lives—especially low-income women and their families.

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BY FATIMA GOSS GRAVES, LIZ WATSON, KATHERINE GALLAGHER ROBBINS,
LAUREN KHOURI, AND LAUREN FROHLICH

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Introduction

DONNA RHODES, A SEASONAL HIGHWAY MAINTAINER for the Illinois Department of Transportation, brought suit for harassment by her supervisor, Michael Poladian.¹ Rhodes alleged the following: When she objected to Poladian's decision to shorten her plow route, Poladian responded by threatening to "strangle her."² After she complained about the threat, the harassment increased—he called her names including "bitch" and "cunt," and forced her to wash a truck in sub-zero temperatures.³ Poladian gave her undesirable work, placed restrictions on her activities that did not apply to any other workers, and told a mechanic not to fix the heat in her truck.⁴ Rhodes also found a picture of a nude woman on her locker, cartoons of a sexual nature on the bulletin board, and pornographic movies playing on the workplace TV.⁵ Throughout much of her employment, Rhodes was the only woman out of thirty-two workers at her work site.⁶

THE COURT DISMISSED RHODES' CLAIMS on the grounds that her harasser was not a supervisor because he could not "hire, fire, demote, promote, transfer or discipline" her.⁷ This was despite the court's acknowledgment that he managed Rhodes' work assignments, investigated employee complaints and disputes, and assigned less desirable duties as a form of punishment.⁸ Poladian held one of the top two jobs at Rhodes' worksite.⁹ The court also held that Rhodes was unable to meet the tougher standard required for a coworker harassment claim to proceed to trial.¹⁰ Rhodes appealed the decision and lost.¹¹ The court never even let her case go to a jury.

Donna Rhodes is not alone.

In a recent survey, 25 percent of women and ten percent of men said they experienced sexual harassment at work.¹²

And when harassment is perpetrated by a supervisor it comes with an explicit or implicit threat that the supervisor will use his authority over the victim to make that person's life a living hell. Lower-level supervisors who do not have the power to hire and fire still have a wide range of authority they can use to wreak havoc in workers' lives—they make decisions about who works the night shift and who works days, who cleans the toilets and who works the cash register, who can take a break and who cannot.¹³

The victims know that if they try to stop the harassment a lower-level supervisor can retaliate by assigning an extremely difficult schedule or worse job duties, or making them work in unsafe conditions.¹⁴ This can make it much more difficult to tell a supervisor to back off or to report the harassment than if the harassment were perpetrated by a coworker.¹⁵

The U.S. Supreme Court has recognized the potential for supervisors to abuse their power by harassing their subordinates, and that employers have both the ability and responsibility to try to prevent this abuse.¹⁶ And more than 15 years ago, the Supreme Court put in place strong protections against supervisor harassment.¹⁷ But over the years some courts watered down those protections by defining supervisor very narrowly, and excluding workers harassed by lower-level supervisors from the reach of those protections.¹⁸ As a result, whether workers were able to have their day in court often turned on the court's definition of "supervisor."¹⁹

In a recent five-to-four decision in *Vance v. Ball State University*, the Court made it more difficult to seek a remedy for supervisor harassment by adopting a narrow and unrealistic definition of who is a supervisor.²⁰ The Court held that supervisors who direct daily work activities—but lack the power to hire and fire—are mere coworkers, and that the tougher legal standard that applies in cases of

coworker harassment also applies to harassment by these lower-level supervisors.²¹ The Court's cramped definition of supervisor ignores workplace realities, with negative consequences for millions of workers.

The reality is that most lower-level supervisors have significant authority over their subordinates, even though they do not have the power to hire and fire.²² There are more than three million of these lower-level supervisors for more than 17 million low-wage workers—virtually all of the low-wage workforce.²³ And another three million lower-level supervisors oversee millions of workers who do not earn low wages.²⁴

This report focuses on the likely impact of the *Vance* decision on the low-wage workforce, because workers in low-wage jobs are particularly vulnerable to harassment and these workers are predominantly women.²⁵ But the *Vance* decision puts all workers who are harassed by lower-level supervisors between a rock

and a hard place. These workers know that they may be putting their jobs on the line by reporting harassment. For those still willing to take the brave step of trying to hold their employers accountable despite the risk involved, they now stand a good chance of having their cases thrown out by the court for failure to meet the definition of supervisor adopted in *Vance*. And their employers have fewer incentives to prevent and remedy harassment by lower-level supervisors, making that harassment more likely to occur.

The Center's report offers a glimpse into the post-*Vance* future, by chronicling cases of egregious harassment by lower-level supervisors in which women lost in court because the courts held that their harassers were coworkers, rather than supervisors. The report then highlights practical steps that Congress, states, and the Equal Employment Opportunity Commission can take to address the mismatch between current law and workplace realities.

The realities of the workplace

WRITING FOR THE DISSENT, JUSTICE GINSBURG

observed that the majority opinion in *Vance* was “blind to the realities” of the workplace.²⁶ This report shines a light on several of those important realities.

WORKPLACE REALITY: SEXUAL HARASSMENT OF LOW-WAGE WORKERS IS WIDESPREAD

Sexual harassment is widespread in the workforce overall. In Fiscal Year 2013, the combined total number of harassment charges filed with the Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices Agencies was over 30,000.²⁷ More than 10,000 of these charges involved sexual harassment, and 82 percent were brought by women.²⁸ But these numbers probably do not even come close to reflecting the extent of sexual harassment. In a recent survey, 60 percent of workers who experienced harassment said they never reported it.²⁹

The pervasiveness of sexual harassment has also been well documented among low-wage workers.³⁰ In a study of more than 1,200 predominantly low-income union workers in the Boston area, 26 percent of women and 22 percent of men reported experiencing sexual harassment.³¹ African-American women were more likely to report having experienced sexual harassment (28 percent) than white women (21 percent) and Latinas (17 percent).³²

A survey conducted by the Restaurant Opportunities Centers (ROC) United found that more than one in ten workers in the restaurant industry reported that they or a coworker had experienced sexual harassment, and this is likely an undercount.³⁷ As ROC noted, a 2011 review by MSNBC of EEOC charge data found that nearly 37 percent of EEOC sexual harassment charges from January to November 2011 came from women in the

WOMEN ARE THE MAJORITY OF WORKERS IN LOW-WAGE JOBS

Women make up more than three-quarters of workers in the ten largest low-wage occupations (those that typically pay less than \$10.10 an hour).³³ These occupations include child care workers (95 percent women), maids and housekeepers (89 percent women), home health aides (89 percent women), personal care aides (84 percent women), and cashiers (72 percent women).³⁴ And many of the predominantly female occupations that pay low wages—including home health aides, personal care aides, combined food preparation and serving workers, and child care workers—rank in the top 30 occupations with the largest projected job growth between 2012 and 2022.³⁵ Low-wage workers—three-quarters of whom are women and more than one-third of whom are women of color³⁶—juggle multiple personal, caregiving, and financial responsibilities and can least afford to have their livelihoods threatened by harassment.

SUPERVISOR HARASSMENT IN THE AGRICULTURAL INDUSTRY

Maricruz Ladino worked in the tomato fields for 18 years. She alleged that her farm supervisor constantly harassed her and pressured her to have sex with him. “There are supervisors who try to use their power to mistreat or abuse people. One of the supervisors wanted me to go with him to check the crops. He insinuated that he wanted other things with me. One day we went to do an inspection in a field. He took the opportunity to abuse me. It happened in a place far from other people. I couldn’t say anything. I couldn’t even scream because it is very traumatic.” She was afraid she would be seen as a troublemaker if she reported the supervisor to management. “If I said anything I would lose my job. I couldn’t lose my job because I was the one taking care of my daughters. It’s very difficult to decide what to say.

How do I react?”

Public Broadcasting Service, FRONTLINE
Documentary, “Rape in the Fields”
(June 25, 2013).⁴⁸

restaurant industry.³⁸ Workers described harassment in restaurants as simply “an accepted part of the culture.”³⁹ This is an industry that pays especially low wages—approximately 70 percent of food servers are women, and workers who serve food and drinks earn a median wage of \$8.89 per hour.⁴⁰

Women working in agriculture, who are often migrant workers, are also especially vulnerable to sexual harassment. Agriculture is a heavily male-dominated industry (roughly 22 percent female), and farmworkers and laborers earn a low hourly median wage of \$8.90.⁴¹ A survey of 150 female farmworkers in California’s Central Valley found that 80 percent of these workers had experienced some form of sexual harassment.⁴²

Among farmworkers, harassment ranges from unwanted touching and remarks to sexual assault and rape in the fields, where harassers are often able to perpetrate their crimes in private.⁴³ Sexual harassment and assault is so common that farms in California have been referred to by farmworkers as the “field of panties” and farms in Florida as the “Green Motel.”⁴⁴

Whole families and communities of farmworkers migrate, work, and live together during the work season.⁴⁵ The blurring of work and family lines makes reporting supervisor harassment especially difficult for these workers.⁴⁶ For migrant farmworkers who are harassed, seeking justice can mean risking their livelihoods, putting their families at risk, and potentially risking deportation.⁴⁷

The prevalence of sexual harassment has been documented in many other industries that pay low wages, such as hospitality⁴⁹ (where maids and housekeepers are paid a median hourly wage of \$9.14)⁵⁰ and sales and related service⁵¹ (where cashiers are paid a median hourly wage of \$9.13).⁵²

Because they often have little bargaining power, workers in low-wage jobs can be severely affected by harassment that involves manipulation of their daily work activities.⁵³ Low-wage workers are least able to absorb the financial blow of a reduction in hours, or of sudden changes in their work schedules that make it difficult for them to arrange

child care or transportation to work. But this is exactly the type of harassment that lower-level supervisors are well-positioned to perpetrate.

WORKPLACE REALITY: MILLIONS OF LOWER-LEVEL SUPERVISORS HAVE SIGNIFICANT POWER OVER LOW-WAGE WORKERS

The majority decision in *Vance* was premised on the assumption that lower-level supervisors do not have sufficient authority to qualify as supervisors. But research shows that in the modern workplace, lower-level supervisors have substantial power over their subordinates. And these lower-level supervisors are extremely common in low-wage industries.

Lower-level supervisors exercise significant direction and control over their subordinates' daily work activities

The academic literature and an informal survey by the Center show that lower-level supervisors increasingly play an intermediate supervisory role between entry-level workers—workers with the lowest level jobs—and managers.⁵⁴ While lower-level supervisors have significant responsibility for directing entry-level workers' day-to-day activities, most have no formal authority to hire or fire workers, which often lies with managers.⁵⁵

The responsibilities of lower-level supervisors include:

1. Planning and scheduling; documentation of records and reports
2. Carrying out "human relations" counseling
3. Coordination and control; organizing work
4. Maintaining external relations
5. Managing performance – reward contingencies
6. Maintaining quality and efficiency
7. Maintaining safety and cleanliness
8. Maintaining machinery and equipment
9. Selecting employees [for tasks]
10. Training employees
11. Stimulating suggestions
12. Maintaining union-management relations.⁵⁶

SUPERVISOR HARASSMENT IN THE RESTAURANT INDUSTRY

Eighteen-year-old Gabriela Rios-DaSilva worked as a bartender and server at One, Inc. in Puerto Rico. She alleged that her supervisor frequently pulled her close to his body, gave her hugs, grabbed her by the arms and made sexual comments including: "I can't wait to have you"; "You are mine"; "You would like to go out with an older man like me"; "You look hot today"; and "Where do you live so I can pick you up?" She worked under these conditions for eight months, and in April 2011, when she could not tolerate the harassment any longer, she quit her job.

Rios brought a sexual harassment lawsuit against her employer which is still pending.

Rios-DaSilva v. One, Inc., No. 12–1286 (DRD), 2013 WL 5912573 (D. P.R. Oct. 7, 2013).

The substantial responsibilities assigned to lower-level supervisors reflect a trend toward a flattening of organizational hierarchies, in which many businesses have moved to team-based management, shifting “supervision, responsibility, and even discipline... from managers to peers.”⁵⁷ As a recent survey of 135 organizations in the United Kingdom explained, this structure has left managers responsible for long-term planning and directing operations on a larger scale, but they may lack direct responsibility for the routine matters that affect entry-level workers; those responsibilities are often left with lower-level supervisors.⁵⁸

While these organizational trends are widespread throughout the economy, this report focuses on the supervisory structure in low-wage jobs, which are predominantly held by women.⁵⁹ An informal survey of seven organizations advocating for workers representing ten low-wage industries provides additional evidence that lower-level supervisors (described in the survey as “first-line supervisors”) exercise significant control over daily work activities but have little authority to take tangible employment actions like hiring and firing, setting pay, or promoting their subordinates.

All of the organizations reported that lower-level supervisors have significant responsibility for directing daily work activities. They unanimously reported that lower-level supervisors in their industries have the authority to train and mentor new workers (10/10), and assign tasks or give permission for breaks (10/10). Most reported that lower-level supervisors in their industries have the authority to set worker schedules (6/10), make teams or assign partners (7/10), and coach workers and evaluate performance (8/10).

In contrast, according to all but one of the organizations surveyed, lower-level supervisors do not have the authority to hire and fire workers.⁶⁰ Similarly, they reported that lower-level supervisors do not have the authority to approve raises or promotions in any of their industries. The organizations reported that only managers or other higher-level employees in their industries have the authority to take actions like hiring or firing (9/10) or setting pay or promoting workers (10/10).

FIGURE 1: ORGANIZATIONS ADVOCATING FOR WORKERS WEIGH IN

Organizations Advocating for Workers by Industry

First-Line Supervisor Responsibilities	Agriculture	Retail 1	Retail 2	Garments	Home Care	Nursing Homes	Food Service 1	Food Service 2	Hospitality 1	Hospitality 2	Count
1. Hire and fire workers	✓										1
2. Approve raises or promotions											0
3. Discipline workers	✓	✓		✓					✓	✓	4
4. Assign overtime	✓			✓			✓		✓	✓	4
5. Coach workers and evaluate worker performance	✓	✓		✓	✓		✓	✓	✓	✓	8
6. Train and mentor new workers	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10
7. Set schedules	✓			✓	✓		✓		✓	✓	6
8. Approve worker requests for schedule changes or time off	✓			✓	✓				✓	✓	4
9. Assign tasks or give permission for breaks	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10
10. Make teams or assign partners		✓		✓	✓	✓	✓	✓	✓	✓	7

Note: The survey responses depicted are from the following organizations: Agriculture-Coalition of Immokalee Workers (CIW); Retail 1-Retail Action Project (RAP); Retail 2-Organization United for Respect at Walmart (OUR Walmart); Garments-Garment Worker Center (GWC); Home Care-Paraprofessional Healthcare Institute (PHI); Nursing Homes-PHI; Food Service 1-Restaurant Opportunities Centers (ROC) United; Food Service 2-UNITE HERE; Hospitality 1 & 2-UNITE HERE.



TABLE 1: LARGEST OCCUPATIONS WITHIN INDUSTRIES SURVEYED BY NWLC

Industry & Occupation	Median hourly wage within industry	Percent women (all industries)
Support Activities for Agriculture and Forestry		
Farmworkers and Laborers, Crop, Nursery, and Greenhouse	\$8.90	19.1*
Graders and Sorters, Agricultural Products	\$9.09	61.5
Retail Trade		
Retail Salespersons	\$10.09	49.7
Cashiers	\$9.13	71.7
Apparel Manufacturing (Garments)		
Sewing Machine Operators	\$9.29	76.1
Textile Cutting Machine Setters, Operators, and Tenders	\$9.90	N/A
Home Health Care Services		
Home Health Aides	\$9.82	89.0*
Personal Care Aides	\$8.90	84.7
Nursing and Residential Care Facilities		
Nursing Assistants	\$11.31	89.0*
Home Health Aides	\$10.21	89.0*
Food Services and Drinking Places		
Combined Food Preparation and Serving Workers, Including Fast Food	\$8.71	65.3
Waiters and Waitresses	\$8.89	70.4
Accommodation (Hospitality)		
Maids and Housekeeping Cleaners	\$9.14	87.7
Hotel, Motel, and Resort Desk Clerks	\$9.74	72.8

*The occupation categories used to determine the percentage of women are slightly broader than the occupations listed.

Source: Bureau of Labor Statistics, May 2012 National Industry-Specific Occupational Employment and Wage Estimates, available at <http://www.bls.gov/oes/current/oesosci.htm>. Percent women based on Bureau of Labor Statistics, Current Population Survey, Table 11, Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, Annual Averages, available at <http://www.bls.gov/cps/cpsaat11.htm>. Detailed occupations shown here are the top two that made up the largest share of the industry.

Virtually all low-wage workers are in industries with lower-level supervisors

Today there are more than six million lower-level supervisors in the American workplace, more than half of whom oversee low-wage workers.⁶¹

In fields with a lower-level supervisor and where low-wage occupations account for at least ten percent of the workforce:⁶²

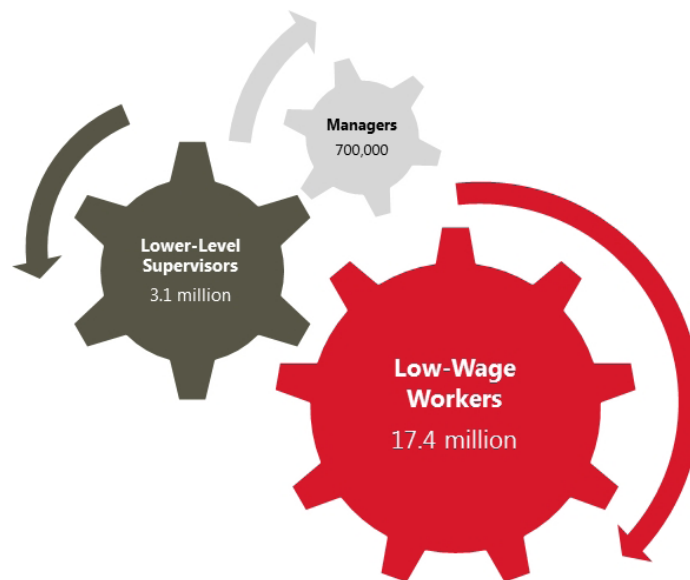
- **3.1 million lower-level supervisors oversee low-wage workers.**⁶³
- In comparison, only 690,000 higher-level managers are responsible for low-wage workers.⁶⁴
- **17.4 million of the 42.6 million workers in these fields—over 40 percent—hold low-wage jobs.**⁶⁵

For more information on the data sources and definitions in this analysis, see the Methodological Appendix.

TECHNICAL NOTE: To determine the prevalence of lower-level supervisors—those who direct daily work activities but are unlikely to have hire/fire power—in fields employing low-wage workers, we examined the numbers of supervisors classified as “first-line supervisors” by the Bureau of Labor Statistics Standard Occupational Classification (SOC) system.⁶⁶ Our analysis examined the workforce in major occupation groups (described throughout this report as “fields examined”) with a first-line supervisor position and where low-wage jobs account for at least ten percent of the workforce.⁶⁷ The fields analyzed capture the large majority (92 percent) of workers in low-wage occupations.⁶⁸

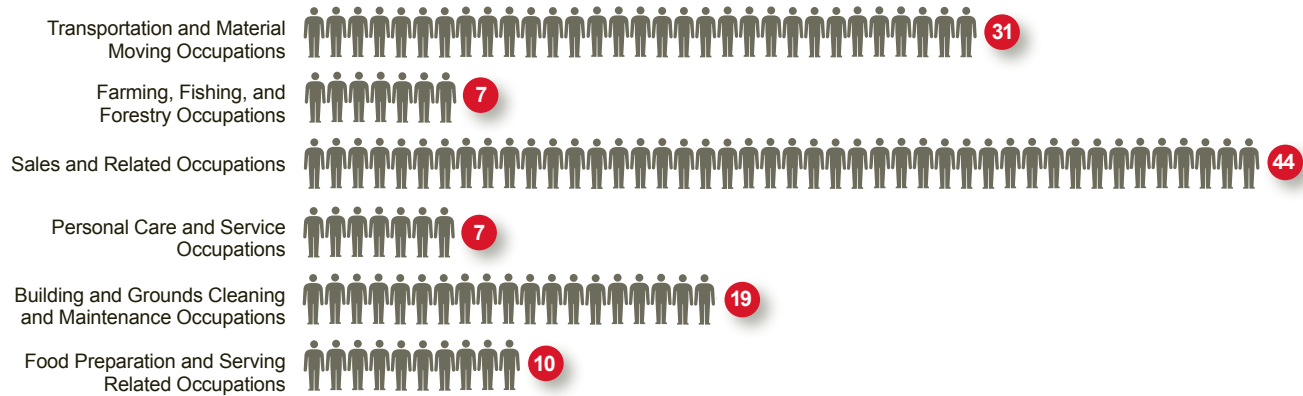
The fields examined have more than four times as many lower-level supervisors as managers.⁶⁹

FIGURE 2: THE LOW-WAGE WORKPLACE



Note: Workers shown are in major occupation groups, or fields, which include a first-line supervisor and for which low-wage occupations account for at least ten percent of the workforce. Data only include managers and first-line supervisors who are responsible for low-wage workers. See Methodological Appendix for details.
Source: Bureau of Labor Statistics, Occupational Employment Survey, May 2012.

FIGURE 3: THE NUMBER OF LOWER-LEVEL SUPERVISORS FOR EVERY 100 LOW-WAGE WORKERS—BY OCCUPATION GROUP



Note: Occupations shown are in major occupation groups, or fields, that include first-line supervisors and for which low-wage occupations account for at least ten percent of the workforce. Data only include first-line supervisors who are responsible for low-wage workers.

Source: Bureau of Labor Statistics, Occupational Employment Survey, May 2012.



The ratio of lower-level supervisors to low-wage workers varies by the field examined, ranging from seven to 44 lower-level supervisors for every 100 low-wage workers.

- Across all of these fields, there are approximately **18 lower-level supervisors and only 4 managers responsible for every 100 low-wage workers.**
- In the field with the most low-wage workers, Food Preparation and Serving Related Occupations (over 9.2 million low-wage workers), there are **10 lower-level supervisors and only 2 managers responsible for every 100 low-wage workers.**

These numbers suggest that lower-level supervisors are far more common than managers in many fields employing a substantial share of low-wage workers.

WORKPLACE REALITY: LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT BY LOWER-LEVEL SUPERVISORS

Robust protections from harassment by lower-level supervisors are crucial because of the organizational trend toward lower-level supervisors having significant authority over the workers they oversee. This is especially true in light of the prevalence of workplace harassment in many low-wage industries and the substantial number of lower-level supervisors in those industries.

And more than 15 years ago, the Supreme Court put strong protections in place. Recognizing the potential for supervisors to abuse their power over their subordinates, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court held that employers have a heightened legal responsibility to protect workers from supervisor harassment.⁷⁰

LEGAL STANDARDS THAT APPLY TO SEXUAL HARASSMENT CLAIMS

The standard for employer liability for workplace harassment hinges in part on whether the harasser is a supervisor.

- *Harassment resulting in a tangible employment action:* An employer is automatically responsible for supervisor harassment that results in a tangible employment action, like firing or demoting the victim.⁷¹
- *Harassment that does not result in a tangible employment action:*
 - *By a supervisor:* When supervisor harassment does not result in a tangible employment action, the employer is also automatically responsible unless the employer can prove an “affirmative defense” to liability. The employer is not liable only if it exercised reasonable care to prevent and correct the harassment and the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer or to otherwise avoid harm.⁷²
 - *By a coworker:* In cases of coworker harassment, a tougher negligence standard applies. The plaintiff faces the additional hurdle of proving that the employer was negligent in controlling working conditions—that the employer “knew or should have known about the conduct and failed to stop it.”⁷³

Faragher and *Ellerth* established an important principle: because a supervisor’s ability to harass is a direct result of the authority given to the supervisor by the employer, the employer should be liable for the supervisor’s actions *unless* the employer can show that it took steps to prevent harassment and to address harassment when it occurred, and that the plaintiff failed unreasonably to take advantage of the opportunities provided by the employer to report and address the harassment.⁷⁴ This rule encourages employers to put policies in place to prevent harassment and to respond promptly and effectively when harassment occurs.⁷⁵

In 1999, the EEOC issued guidance explaining that the standard for liability in supervisor harassment cases articulated in *Faragher* and *Ellerth* applies to harassment by: those who direct employees’ daily work activities, such as those with the authority to increase employees’ workload, assign undesirable tasks, train employees, and oversee their daily work; and those with the power to undertake or recommend tangible employment actions such as hiring, firing, setting pay, or making promotion decisions.⁷⁶ Including individuals who direct daily work activities within the definition of supervisor reflects that these individuals have significant power over their subordinates, and that their power comes directly from the employer.⁷⁷ Unfortunately, some courts failed to follow the EEOC guidance, resulting in watered down protections for workers.

Vance v. Ball State University undercut protections from harassment by redefining lower-level supervisors as coworkers

IN *VANCE V. BALL STATE UNIVERSITY*, the Supreme Court ignored the EEOC's guidance, deciding lower-level supervisors who have the power to direct daily work activities—but who do not have the power to hire, fire and take other tangible actions against their subordinates—should be treated like coworkers under the law, and that victims of harassment by lower-level supervisors must proceed under the more difficult negligence standard that applies in coworker harassment cases.⁷⁸

The *Vance* decision is disconnected from the day-to-day reality of the workplace, and makes it harder for victims of harassment at the hands of a lower-level supervisor to have their day in court.

By narrowing the definition of supervisor to only those with the power to effect “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits[.]” *Vance* gives cover to employers who bury their heads in the sand when it comes to how their entry-level workers are treated.⁷⁹ The decision ignores the reality of today's workplace—where more than six million lower-level supervisors exercise significant control over their subordinates. The decision will have negative consequences for workers across the income spectrum. And it could have a particularly devastating effect in

VANCE v. BALL STATE UNIVERSITY

Maetta Vance, an African-American catering assistant at Ball State University, filed a lawsuit for racial harassment perpetrated by Saundra Davis, the catering specialist whom Vance alleged was her supervisor.⁸¹ She alleged that Davis subjected her, often the only African-American worker in the catering department at Ball State, to racial slurs, threats, and intimidation.⁸² When Vance complained to management about the harassment, they told both Vance and Davis to “respect” each other.⁸³ After that, things got worse. Davis taunted Vance, and one day cornered her on campus with her daughter who said, “[y]ou are... a fucking nigger.... I'll kick your ass.”⁸⁴

In addressing Vance's claim, the Supreme Court held that an employee is a “supervisor” for purposes of determining the employer's liability for harassment under Title VII of the Civil Rights Act only if he or she is empowered by the employer to take tangible employment actions against the victim.⁸⁵

Because Davis did not have the power to take tangible employment actions, like hiring, firing, or denying a promotion to Vance, the Court held that Davis did not qualify as Vance's supervisor.⁸⁶

low-wage industries, since more than half of lower-level supervisors are in industries with low-wage workers.⁸⁰

Now, in addition to proving that harassment took place, workers seeking to hold their employers accountable for a hostile work environment created by their lower-level supervisors must also prove that their employers were negligent in controlling working conditions, the standard that applies to coworker harassment claims. As Justice Ginsburg pointed out in her dissent in *Vance*, whether an employer is negligent is often very difficult for a worker to know since it is the employer—not the worker—who has ready access to records of its actions in response to a harassment complaint.⁸⁷

Cases of lower-level supervisor harassment decided before *Vance* provide a window into the future for victims of harassment. In the harassment cases discussed below, whether a retail worker, a mechanic's helper, chicken processing plant workers, truck drivers, and a fast food worker were able to have their day in court turned on the courts' definition of supervisor. These cases show that when courts apply an overly constrained definition of supervisor, harassment victims can often lose as a direct result.

IN A HARASSMENT CLAIM, WHETHER WORKERS WILL BE ALLOWED TO HAVE THEIR DAY IN COURT OFTEN TURNS ON THE COURT'S DEFINITION OF SUPERVISOR

Prior to the Supreme Court's decision in *Vance*, federal appellate courts in the Second and Fourth Circuits and some federal trial courts followed the EEOC guidance, treating both individuals with the power to take tangible employment actions and individuals who direct daily work activities as supervisors.⁸⁸ This was often crucial to workers' ability to survive employers' efforts to get their harassment claims dismissed.

For example, in *Whitten v. Fred's, Inc.*, a case in the Fourth Circuit, Clara Whitten, the assistant store manager at a Fred's Super Dollar Store, was able to get her day in court because the appellate court held that Matt Green, the alleged harasser and store manager, was her

supervisor.⁸⁹ Whitten's lawsuit included the following allegations: Green told Whitten she needed to "be good to [him] and give [him] what [he] want[ed]" if she wanted long weekends off from work, and that he would make her life a "living hell" if she ever took work matters "over [his] head."⁹⁰ Green walked behind Whitten, pressing his genitals into her back.⁹¹ When Whitten ignored his order to meet him in the storeroom at the back of the store, afraid of what would happen there, Green responded by ordering her to stay late to clean. He told her that the store should be spotless and that he did not care if it took her all night.⁹²

The employer did not even contend that Green did not commit unlawful harassment. Instead, it tried to escape liability by arguing that Green was not Whitten's supervisor. The lower court dismissed Whitten's case on the grounds that Green was not her supervisor because he did not have the power to hire, fire, or take other actions that would have an economic impact on Whitten.⁹³ That court then held that Whitten was unable to meet the tougher standard for employer liability that applies in cases of coworker harassment.⁹⁴ The appellate court reversed, holding that Green was Whitten's supervisor because he exercised "significant" authority over Green, including the ability to "change Whitten's schedule and impose unpleasant duties on a whim."⁹⁵ As a result, Whitten was able to proceed with her claims.⁹⁶

The Second Circuit also defined "supervisor" to include individuals with authority to direct daily work activities, and as a result workers harassed by these supervisors were able to have their day in court. In *Mack v. Otis Elevator Co.*, Yasharay Mack, a mechanic's helper, made the following allegations of harassment by James Connolly, the mechanic-in-charge and most senior employee at her worksite: Connolly frequently stripped down to his underwear in front of Mack, and adjusted himself while changing his clothes.⁹⁷ Connolly grabbed Mack by the waist, pulled her into his lap, tried to kiss her, and touched her buttocks.⁹⁸ Connolly frequently questioned why, as an African-American woman, Mack had her job, and boasted to her about his sexual exploits.⁹⁹ Connolly made inappropriate comments about Mack's appearance, stating that she was "the most attractive helper" he had seen, and that she had a "fantastic ass,"

“luscious lips,” and “beautiful eyes.”¹⁰⁰ When Connolly became angry with Mack, he denied her overtime hours.¹⁰¹ When Mack asked Connolly to stop harassing her, he replied, “I get away with everything.”¹⁰²

The lower court decided that Connolly was not Mack’s supervisor, and then dismissed Mack’s claim on the grounds that Mack would not be able to prove employer negligence—as required in a case of coworker harassment.¹⁰³ The appellate court reversed, holding that the mechanic-in-charge was Mack’s supervisor because he had the authority to assign work and direct the workforce.¹⁰⁴ As a result, Mack was able to get her day in court.¹⁰⁵

Some lower courts also applied the EEOC’s commonsense definition of “supervisor,” allowing workers who experienced harassment to survive employers’ attempts to have their claims dismissed before trial. For example, in *Dinkins v. Charoen Pokphand USA, Inc.*, six women workers in a chicken processing plant brought suit against their employer for harassment by their lower-level supervisors.¹⁰⁶ Jennelle Beasley alleged that Jerry Marsh told her “every time he looked into her eyes” it made his “dick trickle,” and that he had some lotion in his van he wanted to rub on her.¹⁰⁷ Beasley also alleged that Marsh repeatedly stood behind her, simulating masturbation and anal intercourse while she worked; grabbed her between the legs; touched her breasts; and followed her into the restroom and touched her inappropriately.¹⁰⁸

The employer’s attempt to persuade the court to dismiss the case on grounds that the harassers were not supervisors was unsuccessful. The court held that the harassers were supervisors because they trained workers; moved from line to line observing workers’ progress while more junior employees were not permitted to leave the line; reported workers’ mistakes and gave them written warnings; and had titles like line chief and line leader.¹⁰⁹ Beasley and the other women workers were able to proceed with their claims.¹¹⁰

WHEN COURTS HAVE DEFINED SUPERVISOR NARROWLY, EMPLOYERS HAVE OFTEN ESCAPED LIABILITY FOR HARASSMENT

In *EEOC v. CRST Van Expedited, Inc.*, newly hired truck drivers brought claims for harassment by their lower-level supervisors in the Eight Circuit where courts defined supervisor very narrowly. Many of their claims were dismissed as a result.

Catherine Granofsky-Fletcher, Antoinette Baldwin, Maybi Fernandez-Fabre, and Jennifer Susson were newly hired truck drivers for CRST Van Expedited based in Cedar Rapids, Iowa.¹¹¹ They made the following allegations of harassment by their supervisors, the Lead Drivers in their truck driving training program¹¹²: Granofsky-Fletcher alleged her Lead Driver, William Yoder, told her to “scoot over” so he could join her in her bunk. When she refused, he threw things around the truck angrily. The next day, he removed his shirt and said she “was going to do it or [she] wasn’t going to pass.”¹¹³ Baldwin alleged her Lead Driver, Steven Pears, made repeated sexual advances. She wanted to report his conduct, but he refused to let her use the phone in the truck. He told her “[it’s] his truck and he can do what he wants to do in his truck.” She hoped saying “no” repeatedly would put a stop to his behavior. Instead, Pears ordered Baldwin off the truck mid-trip and left her at a truck stop in Illinois.¹¹⁴ Fernandez-Fabre alleged her Lead Driver exposed himself, urinated in her presence, and required her to urinate in a cup.¹¹⁵ Susson alleged her Lead Driver repeatedly made sexually suggestive comments and touched her inappropriately. He raised his hand as if he was going to hit her and then he spit in her face instead.¹¹⁶

The Lead Drivers were responsible for training the women during a 28-day trip, deciding when they could pull off the road for a rest stop, and giving them a “pass/fail” grade that would weigh heavily in the ultimate decision about whether they would get trucker certification.¹¹⁷ Despite the significant power they held over the newly hired truck drivers, when the EEOC brought suit for supervisor harassment on behalf these and dozens of other women harassed by Lead Drivers, the court held that their harassers were not supervisors because they did not have the power to hire

and fire.¹¹⁸ Instead the court held that their harassers were mere coworkers, and that many of the women did not meet the far tougher standard that applies in cases of coworker harassment.¹¹⁹ As a result, these women's cases were thrown out.¹²⁰ The court's decision was later upheld by the Eighth Circuit.¹²¹

In all of the cases described above, lower-level supervisors abused the power given to them by their employers to harass their victims. Extremely difficult schedules, worse job duties, and poorer working conditions were often imposed or threatened as part of the harassment. But even in the face of egregious abuses by lower-level supervisors, whether workers could have their day in court turned on whether their harassers met the court's definition of supervisor.¹²²

COURTS HAVE ALREADY BEGUN DENYING JUSTICE TO WORKERS AS A RESULT OF VANCE

The *Vance* decision is already making it more difficult to hold employers accountable for harassment by lower-level supervisors.¹²³ For example, in *McCafferty v. Preiss Enterprises, Inc.* the Tenth Circuit recently affirmed dismissal of Megan McCafferty's case on the grounds that her harasser was not a supervisor.¹²⁴

McCafferty was a 15-year-old student who alleged that Jacob Wayne Peterson, her 21-year-old shift supervisor

at McDonald's, offered her a ride from school to her job but, instead of driving her to work, told her she could take the day off and drove her to his friend's house.¹²⁵ She further alleged that over the course of two days he sexually assaulted her while plying her with drugs and alcohol.¹²⁶

The Tenth Circuit affirmed the lower court's dismissal of McCafferty's case, holding that her employer was not responsible for Peterson's harassment because he was not a supervisor as defined by the Supreme Court in *Vance* since he lacked the power to hire, fire, and promote employees.¹²⁷ This was despite the fact that Peterson was often the most senior person on duty when McCafferty worked, and was a participant in McDonald's manager-in-training program, assigned job duties, scheduled break time, had authority to authorize overtime, and had authority to send employees home when work was slow or when an employee had engaged in misconduct.¹²⁸

McCafferty illustrates the challenge of the *Vance* decision in the 21st century workplace: **employers have concentrated hire and fire power in the hands of a few higher-level managers while dispersing substantial daily supervisory responsibilities among lower-level supervisors, whose harassment is far less likely to lead to employer liability.** Since the *Vance* decision, some lawyers have already begun advising employers to use this strategy to limit their liability for harassment by lower-level supervisors.¹²⁹

Extremely difficult schedules, worse job duties, and poorer working conditions were often imposed or threatened as part of the harassment.

Commonsense solutions to restore crucial protections from harassment

VANCE UNDERMINES TWO CORE PRINCIPLES that have long governed the legal standards in workplace harassment cases—employers should be held accountable for supervisor harassment, and they should be encouraged to take proactive measures to address it. By imposing an absurdly narrow definition of supervisor, *Vance* put a giant roadblock in the path of workers seeking a remedy for workplace harassment. It also weakens incentives for employers to prevent and quickly respond to workplace harassment by lower-level supervisors.

Justice Ginsburg stated in her dissent that “the ball is once again in Congress’s court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today.”¹³⁰

The recently introduced Fair Employment Protection Act would restore strong protections from harassment in federal law by:

- Providing for employer vicarious liability in hostile work environment and retaliatory hostile work environment harassment claims on the basis of sex, race, national origin, religion, disability, age, and genetic information, when that harassment is committed by either:
 - individuals with the authority to take tangible employment actions like hiring, firing and promoting employees; OR
 - individuals with the authority to direct daily work activities.¹³¹

The Fair Employment Protection Act would leave undisturbed:

- Employers’ affirmative defense to vicarious liability;
- The negligence standard that applies to coworker harassment; and

- The strict liability standard that applies in cases of supervisor harassment resulting in a tangible employment action.¹³²

In addition, there is a real risk that courts will adopt an overly narrow interpretation of the already onerous standard in *Vance*, limiting workplace protections against harassment even further. The EEOC should clarify for courts, employers, and workers how *Vance* applies in workplaces where employers have delegated most supervisory responsibilities to lower-level supervisors. For example, the EEOC should take steps to ensure that employers do not mislabel their workers in efforts to avoid workplace liability—employers that effectively delegate hire and fire authority to lower-level supervisors may still be subject to supervisor harassment standards.¹³³ Furthermore, the EEOC should remind employers that the negligence standard that applies in cases of coworker harassment is not an impossible standard for workers to meet. In fact, in *Vance* the Supreme Court noted that the degree of authority delegated to lower-level supervisors and the extent to which the employer monitored the workplace and had systems in place to respond to harassment should be considered in evaluating employer negligence.¹³⁴ Guidance explaining how employer-delegated authority and ineffective complaint mechanisms should be considered by courts when evaluating employer negligence in a coworker harassment case could help avoid decisions that misinterpret the standards.

Likewise, states can take actions to restore worker protections from supervisor harassment. For example, Maryland has already introduced the Fair Employment Preservation Act to amend Maryland’s nondiscrimination law to make clear that employers are vicariously liable for harassment by individuals with the authority to take tangible employment actions and those who direct daily work activities.¹³⁵

Conclusion

AFTER FIVE DECADES OF FEDERAL PROHIBITIONS

against sex discrimination, the continued prevalence of sexual harassment is a testament to the inequality that still plagues our nation's workplaces. The Supreme Court's decision in *Vance* leaves workers who experience sexual harassment at the hands of lower-level supervisors unequal and without adequate protections. And many of those put at greater risk and left with fewer remedies are women working in low-wage jobs.

There is no dispute that lower-level supervisors' ability to harass their subordinates is firmly rooted in the power given to them by their employers. Legislators and regulators must address the mismatch that *Vance* created between the law and the reality of the workplace.

Methodological appendix

SOURCE

Data from the Bureau of Labor Statistics' (BLS) Occupational Employment Statistics (OES) that “enable the analysis of the occupational composition of different industries” were used in this analysis to conservatively estimate the number of lower-level supervisors in the labor force.¹³⁶ The BLS uses the Standard Occupational Classification (SOC) system to classify data on occupational groups in the national workforce.

The academic literature has long recognized differences in levels of supervisory authority in the workplace, often using a three-tiered system to describe the different roles within an organization. In this system, “managers” are defined as those who (a) “supervise another employee who is directly responsible to [them]” and either (b) “influence or set the rate of pay received by others” or (c) “have the authority to hire or fire others.” “Supervisors,” in contrast, are those who only have supervisory authority (a) and not (b) or (c). “Workers” have no authority to do any of the above.¹³⁷ Using this framework as a starting point, this report examines entry-level workers, lower-level supervisors, and managers.

LOW-WAGE WORKERS

This analysis defines “low-wage occupations” as those with hourly median earnings of \$10.10 per hour or less. The Fair Minimum Wage Act pending in Congress would gradually raise the federal minimum wage from \$7.25 to \$10.10 per hour (and would also increase the tipped minimum cash wage from \$2.13 per hour to 70 percent of the minimum wage and index these wages to keep pace with inflation).¹³⁸

Virtually all workers (96 percent) in low-wage occupations work in fields where first-line supervisors are part of the organizational structure. The other four percent of low-wage workers are in the healthcare field—see “Fields Examined” below for discussion of the classifications of healthcare occupations in this analysis.

LOWER-LEVEL/FIRST-LINE SUPERVISORS

In the data sections of this report, we estimate the number of lower-level supervisors who exercise significant control over daily work activities but do not have the power to hire or fire workers. The position of lower-level supervisor is also called “first-line supervisor” in the literature and in our data source, the SOC. The SOC defines “first-line supervisors” as workers who “spend 80 percent or more of their time performing supervisory activities...”¹³⁹ The first-line supervisor category does not include managers, who engage in “planning and directing” in addition to supervising, nor does it include workers who spend less than 80 percent of their time supervising. The 80-percent threshold means that the number of first-line supervisors reported in this analysis likely understates the number of lower-level supervisors who may have some control over the schedule and daily work activities of an entry-level worker.

In this analysis the “lower-level supervisors” category includes all workers in detailed occupations explicitly labeled as “first-line supervisors,” as well as any detailed occupations that fall under broad categories of “first-line supervisors” such as gaming supervisors and slot supervisors. Two other occupations (aircraft cargo handling supervisors and chefs and head cooks) are also included in the “lower-level supervisors” category for this analysis because they fall between the levels of manager and entry-level worker.

Using “first-line supervisors” as a proxy for lower-level supervisors likely produced a conservative estimate of the number of lower-level supervisors, given that some positions with supervisory authority are not classified as “first-line supervisors” for a variety of reasons. The category “first-line supervisors” likely undercounts the number of supervisors because employees with supervisory duties who spend less than 80 percent of their time supervising are classified with the workers they supervise rather than as “first-line supervisors.” Additionally, several major occupation groups do not have first-line supervisors (including the major occupation groups in the healthcare field—for more information see “Fields Examined”) and thus are not included in this analysis, though they may also have relatively flat or decentralized hierarchies.

When this report describes lower-level supervisors in the “low-wage workplace,” such as in Figures 2 and 3, first-line supervisors are only included if they are responsible for low-wage workers. These determinations were made through qualitative analysis of the Occupational Profiles hierarchy.¹⁴⁰

MANAGERS

Management occupations are not included in the workforces of major occupation groups in the BLS OES because they are classified in a separate major occupation group (11-0000), and thus they are not included in “workforces” in this analysis. Detailed manager occupations were matched to the non-management fields they manage. When this report describes managers in the “low-wage workplace,” such as in Figure 2, managers are only included if they are responsible for low-wage workers. These determinations were made by searching for keywords from the management title in the Occupational Profiles hierarchy.¹⁴¹

FIELDS EXAMINED

This report discusses the number of lower-level supervisors, managers, and low-wage workers in a subset of major occupation groups, described in the report as “fields examined.” Major occupation groups are included if they meet two qualifications: (1) they include a first-line supervisor category in the organizational hierarchy, and (2) a non-trivial share—at least ten percent—of their workforce is comprised of workers in low-wage occupations.

TABLE 2: COMPOSITION OF FIELDS EXAMINED

Major Occupation Group	First-Line Supervisors	Low-Wage Workers	Total Workers ¹⁴²	Share of Workers that are Low-Wage
Food Preparation and Serving Related Occupations	914,970	9,214,350	11,546,880	79.8%
Building/Grounds Cleaning/Maintenance Occupations	170,690	894,920	4,246,260	21.1%
Personal Care and Service Occupations	174,450	2,431,870	3,810,750	63.8%
Sales and Related Occupations	1,457,580	3,318,340	13,835,090	24.0%
Farming, Fishing, and Forestry Occupations	19,340	292,730	427,670	68.4%
Transportation and Material Moving Occupations	366,210	1,198,660	8,771,690	13.7%
Total	3,103,240	17,350,870	42,638,340	40.7%

Note: Fields examined are major occupation groups which include a first-line supervisor and for which low-wage occupations account for at least ten percent of the workforce. Data only include first-line supervisors who are responsible for low-wage workers. *Source:* Bureau of Labor Statistics, Occupational Employment Statistics, May 2012.



This subset captures virtually the entire low-wage workforce because 92 percent of workers in low-wage occupations are clustered in the fields examined. The eight percent of workers in low-wage occupations not represented in this sample fall into four major occupation groups. First, our analysis does not include Healthcare Support Occupations, even though the low-wage detailed occupation of home health aides fits into this field, because workers in the field are usually supervised by workers classified in a different field—Healthcare Practitioners and Technical Occupations. Classifying these groups of workers into two different major occupation groups means that Healthcare Support Occupations are not coded in the OES as having first-line supervisors. Note that even though healthcare support occupations are not included among the fields examined, according to our survey of organizations advocating for workers their workforce does include lower-level supervisors. The following major occupation groups were excluded, even though these fields have first-line supervisors, because workers in low-wage occupations made up less than ten percent of the workforce: Protective Service Occupations (4 percent low-wage), Office and Administrative Support Occupations (1 percent low-wage), and Production Occupations (3 percent low-wage).

Endnotes

- 1 359 F.3d 498, 501-502 (7th Cir. 2004).
- 2 *Id.* at 502.
- 3 *Id.*
- 4 *Id.* at 502-503.
- 5 *Id.*
- 6 *Id.* at 502.
- 7 Rhodes v. Ill. Dep't of Transp., 243 F. Supp. 2d 810, 820 (N.D. Ill. 2003).
- 8 *Id.* at 814, 820 & n.5.
- 9 *Id.* at 814.
- 10 *Id.* at 820-21.
- 11 Rhodes, 359 F.2d at 506-507.
- 12 ABC News & Washington Post, One in Four U.S. Women Reports Workplace Harassment (Nov. 16, 2011), available at <http://www.langerresearch.com/uploads/1130a2WorkplaceHarassment.pdf>.
- 13 See *infra* note 56 and accompanying text.
- 14 Vance v. Ball State Univ., 133 S. Ct. 2434, 2456 (2013) (Ginsburg, J., dissenting).
- 15 *Id.* at 2456-57.
- 16 See *infra* notes 70, 74 and accompanying text.
- 17 See *infra* notes 70-74 and accompanying text.
- 18 See *infra* notes 111-122 and accompanying text.
- 19 See *infra* notes 88-122.
- 20 133 S. Ct. 2434, 2443-44 (2013).
- 21 *Id.* at 2443-48.
- 22 See *infra* notes 54-60 and accompanying text.
- 23 See *infra* notes 62-68 and accompanying text. See also *Methodological Appendix*, Low-Wage Workers.
- 24 National Women's Law Center calculations based on Bureau of Labor Statistics, Occupational Employment Survey, May 2012, available at http://www.bls.gov/oes/current/oes_nat.htm.
- 25 See *infra* notes 30-53 and accompanying text.
- 26 Vance, 133 S. Ct. at 2457 (Ginsburg, J., dissenting).
- 27 E-mail from Indu Kundra, Senior Program Analyst, Program Planning and Analysis Division, Office of Research, Information and Planning, U.S. Equal Employment Opportunity Commission, to Lauren Khouri, Fellow, National Women's Law Center (Feb. 27, 2014) (on file with the National Women's Law Center).
- 28 *Id.*; E-mail from Indu Kundra, Senior Program Analyst, Program Planning and Analysis Division, Office of Research, Information and Planning, U.S. Equal Employment Opportunity Commission, to Lauren Khouri, Fellow, National Women's Law Center (March 3, 2014) (on file with the National Women's Law Center).
- 29 ABC News & Washington Post, *supra* note 12.
- 30 Not only does sexual harassment make working conditions for women in low-wage jobs extremely difficult, it also operates to keep women from moving into higher-paying traditionally male fields. Sexual harassment plays a major contributing role in the persistence of occupational segregation between men and women. See, e.g., Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 58 (2006). This occupational segregation in turn plays a significant role in women's predominance in low-wage jobs.
- 31 Nancy Krieger et al., *Social Hazards on the Job: Workplace Abuse, Sexual Harassment, and Racial Discrimination*, 36 INT'L J. HEALTH SERVICES 51, 67 (2006).
- 32 *Id.*
- 33 National Women's Law Center calculations of labor force demographics based on Miriam King et al., Integrated Public Use Microdata Series, Current Population Survey: Version 3.0 (IPUMS-CPS) (2010). Data are for 2012. All figures are for employed workers. Figures are for low-wage workers in the ten largest low-wage jobs. Ranking of occupations by size and median hourly wage based on Bureau of Labor Statistics, Occupational Employment Statistics, May 2012 National Occupational Employment and Wage Estimates, available at http://www.bls.gov/oes/current/oes_nat.htm.
- 34 Share of women in occupation based on Bureau of Labor Statistics, Current Population Survey, Annual Average 2013, Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, available at <http://www.bls.gov/cps/tables.htm#annual>. The detailed occupation category of "home health aides" is one of the ten largest detailed occupations paying under \$10.10 in 2012 according to the Occupational Employment Statistics. However, this detailed category is not available in the Current Population Survey Annual Average tables. Our analysis of annual average employment instead uses the related broader employment category which also includes orderlies, nursing aides, and psychiatric aides. The other top five low-wage occupations include waiters and waitresses (70 percent women), combined food preparers and servers (65 percent women), bartenders (58 percent women), food preparation workers (56 percent women), and hand packers and packagers (49 percent women).
- 35 NATIONAL WOMEN'S LAW CENTER, JOBS WITH LARGEST PROJECTED GROWTH 2012-2022: ALMOST HALF ARE LOW-WAGE, NEARLY TWO-THIRDS ARE FEMALE-DOMINATED (Dec. 2013), available at <http://www.nwlc.org/resource/jobs-largest-projected-growth-2012-2022-almost-half-are-low-wage-nearly-two-thirds-are-female>.
- 36 See NWLC calculations, *supra* note 33.
- 37 RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., TIPPED OVER THE EDGE: GENDER INEQUITY IN THE RESTAURANT INDUSTRY 23 (Feb. 2012), available at <http://rocunited.org/tipped-over-the-edge-gender-inequity-in-the-restaurant-industry/>.
- 38 *Id.*
- 39 *Id.*
- 40 Bureau of Labor Statistics, Occupational Employment Statistics, May 2012 estimates for Food Services and Drinking Places (NAICS 722000) industry, available at http://www.bls.gov/oes/current/naics3_722000.htm. Percent women based on waiters and waitresses occupation in Bureau of Labor Statistics, Current Population Survey, Table 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, annual averages, available at <http://www.bls.gov/cps/cpsaat11.htm>.
- 41 Bureau of Labor Statistics, Occupational Employment Statistics, May 2012 estimates for Support Activities for Agriculture and Forestry (NAICS 115000) industry, available at http://www.bls.gov/oes/current/naics3_115000.htm. Percent women based on farming, fishing, and forestry occupations in Bureau of Labor Statistics, Current Population Survey, Table 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, annual averages, available at <http://www.bls.gov/cps/cpsaat11.htm>.
- 42 Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (Jan. 2010), available at <http://www.ncfh.org/pdfs/2k9/8716.pdf>.
- 43 *Id.* at 244-47.

- 44 Rebecca Clarren, *The Green Motel*, Ms. Magazine, Summer 2005, available at <http://www.msmagazine.com/summer2005/greenmotel.asp>.
- 45 Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 Am. U. J. GENDER Soc. POL'Y & L. 871, 875 (2012).
- 46 *Id.* at 876-77.
- 47 *Id.* at 876-77 & n.71; Morales Waugh, *supra* note 42, at 245-46, 250-52.
- 48 FRONTLINE: *Rape in the Fields* (Public Broadcasting Service broadcast June 25, 2013), available at <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>.
- 49 David Gilbert et. al, *Sexual harassment issues in the hospitality industry*, 10.2 INT'L J. CONTEMP. HOSPITALITY MGMT. 48, 50 (1998).
- 50 Bureau of Labor Statistics, Occupational Employment Statistics, May 2012 estimates for Accommodation (NAICS 721000) industry, available at http://www.bls.gov/oes/current/naics3_721000.htm.
- 51 Dana Yagil, *When the customer is wrong: A review of research on aggression and sexual harassment in service encounters*, 13 AGGRESSION & VIOLENT BEHAV. 141, 142 (2008).
- 52 Bureau of Labor Statistics, Occupational Employment Statistics, May 2012 estimates for Retail Trade (Sectors 44 and 45) industry, available at http://www.bls.gov/oes/current/naics2_44-45.htm.
- 53 Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1, 8-11 (2012).
- 54 Entry-level or base-level workers are workers who typically make the bottom of the pay scale and are at the base of the supervisory hierarchy and therefore do not supervise other staff.
- 55 Colin Hales, *Rooted in Supervision, Branching into Management: Continuity and Change in the Role of First-Line Manager*, 42 J. MGMT. STUD. 471, 473 (2005).
- 56 Steven Kerr, Kenneth D. Hill & Laurie Broedling, *The First-Line Supervisor: Phasing Out or Here to Stay?* 11 ACAD. OF MGMT. REV. 103, 104 (1986). This article describes this group as "first-line supervisor." For consistency, this report uses the term "lower-level supervisor" throughout.
- 57 WALTER POWELL, THE CAPITALIST FIRM IN THE 21ST CENTURY: EMERGING PATTERNS 36 (2001), available at http://www.stanford.edu/~woody/papers/capitalist_firm.pdf.
- 58 Hales, *supra* note 55, at 484-94.
- 59 See *supra* notes 33-34 and accompanying text.
- 60 The only exception was in the agricultural industry, where according to the advocacy organization representative, "hiring and firing can also be very informal given the day-to-day nature of the industry. For example a worker may not be allowed on the bus or given a job one day to the next which may be due to the work available or may be in retaliation against a worker for making a complaint or in the case of sexual harassment, a woman's failure to give in to the requests of her [superior]." E-mail interview with representative of Coalition of Immokalee Workers (Oct. 8, 2013). First-line supervisors in the agricultural industry do not have the authority to approve raises or promotions, however.
- 61 National Women's Law Center calculations based on Bureau of Labor Statistics, Occupational Employment Survey, May 2012, available at http://www.bls.gov/oes/current/oes_nat.htm.
- 62 Fields examined include: food preparation and serving related occupations, building and grounds cleaning and maintenance occupations, personal care and service occupations, sales and related occupations, farming, fishing, and forestry occupations, and transportation and material moving occupations. See *Methodological Appendix*, Fields Examined.
- 63 National Women's Law Center calculations based on Bureau of Labor Statistics, Occupational Employment Survey, May 2012, available at http://www.bls.gov/oes/current/oes_nat.htm.
- 64 Managers are not included in the 42.6 million workers in the fields examined. See *Methodological Appendix*, Managers.
- 65 National Women's Law Center calculations based on Bureau of Labor Statistics, Occupational Employment Survey, May 2012, available at http://www.bls.gov/oes/current/oes_nat.htm.
- 66 See *Methodological Appendix*, Lower-Level/First-Line Supervisors.
- 67 See *Methodological Appendix*.
- 68 National Women's Law Center calculations based on Bureau of Labor Statistics, Occupational Employment Survey, May 2012, available at http://www.bls.gov/oes/current/oes_nat.htm. The eight percent of workers in low-wage occupations who are not represented in this sample fall into four major occupation groups. For more information, see the *Methodological Appendix*, Fields Examined.
- 69 See *Methodological Appendix*, Lower-Level/First-Line Supervisors, Managers.
- 70 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 763-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 802-807 (1998). See also *Ellerth*, 524 U.S. at 754-55 (applying the principles of agency law to Title VII employer liability).
- 71 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.
- 72 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.
- 73 *Ellerth*, 524 U.S. at 759.
- 74 *Ellerth*, 524 U.S. at 763-65; *Faragher*, 524 U.S. at 801-807. See also EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NOTICE No. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.
- 75 Significantly, the Supreme Court articulated the standard for employer liability for supervisor harassment in a case in which one of the harassing supervisors had the authority to take tangible employment actions and the other did not. See *Faragher*, 524 U.S. at 780-81. In *Faragher*, one of the harassers had authority to hire, supervise, counsel and discipline workers, while the other was a lower-level supervisor who set daily work assignments and supervised work and fitness training for the lifeguard employees. The plaintiff was told by her lower-level supervisor, "[d]ate me or clean the toilets for a year." *Id.* at 780. The Supreme Court made no distinction between the two harassers, considering both to be supervisors for purposes of determining the employer's liability for harassment.
- 76 U.S. Equal Employment Opportunity Commission, *supra* note 74.
- 77 *Id.*
- 78 133 S. Ct. 2434, 2443, 2448 (2013).
- 79 *Id.* at 2443.
- 80 See *supra* note 61-63 and accompanying text.
- 81 *Vance v. Ball State Univ.*, No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836 (S.D. Ind. Sept. 10, 2008).
- 82 Brief for the Petitioner at 6, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (No. 11-556).
- 83 *Id.* at 7.
- 84 *Id.* at 9.
- 85 133 S. Ct. at 2439.
- 86 *Id.* at 2454.
- 87 *Id.* at 2464 (Ginsburg, J., dissenting). Justice Alito did note in his opinion for the majority that it may be possible to hold an employer liable for supervisor harassment when it "effectively" delegates power to those who recommend tangible employment actions, which could include some lower-level supervisors.

- 133 S. Ct. at 2352. Yet courts have already applied this approach inconsistently—for example, one expressly declined to rely on this exception, stating that it would “swallow the rule”. *McCafferty v. Preiss Enterprises, Inc.*, 534 F. App’x 726, 731 (10th Cir. 2013).
- 88 See, e.g., *Whitten v. Fred’s, Inc.*, 601 F.3d 231 (4th Cir. 2010); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254 (M.D. Ala. 2001); *Kent v. Henderson*, 77 F. Supp. 2d 628 (E.D. Pa. 1999).
- 89 601 F.3d 231, 251 (4th Cir. 2010).
- 90 *Id.* at 236.
- 91 *Id.*
- 92 *Id.*
- 93 *Whitten v. Fred’s, Inc.*, No. 8:08-0218-HMH-BHH, 2009 WL 364077, at *4 (D. S.C. Feb. 11, 2009).
- 94 *Id.* at *5-6. Courts must grant summary judgment before trial to the party seeking it if, viewing all the facts in the light most favorable to the other party, the court finds that a reasonable jury could not find in favor of that other party. See *Fed. R. Civ. P. 56*; *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986).
- 95 601 F.3d at 245-46.
- 96 *Id.* at 251. Ultimately *Whitten’s* sexual harassment case was dismissed by the lower court, not because of any problems with the merits of her case, but just because she had failed to disclose the pending lawsuit in an unrelated bankruptcy proceeding. See *Whitten v. Fred’s, Inc.*, No. 8:08-0218-HMH-BHH, 2010 WL 2757005, at *2-3 (D. S.C. July 12, 2010).
- 97 326 F.3d 116, 120 (2d Cir. 2003).
- 98 *Id.* at 120.
- 99 *Id.* at 120-21.
- 100 *Id.* at 120.
- 101 *Id.* at 121.
- 102 *Id.*
- 103 *Mack v. Otis Elevator Co.*, No. 00 CIV 7778 LAP, 2001 WL 1636886, at * 7-11 (S.D.N.Y. Dec. 18, 2001).
- 104 326 F.3d at 125-27.
- 105 *Id.* at 128. Ultimately *Mack* and her employer both agreed to the dismissal of her lawsuit before a trial had occurred. See *Stipulation and Order of Dismissal, Mack v. Otis Elevator Co.*, No. 1:00-cv-7778-LAP (S.D.N.Y. Oct. 21, 2004).
- 106 133 F. Supp. 2d 1254, 1257-61 (M.D. Ala. 2001).
- 107 *Id.* at 1258.
- 108 *Id.*
- 109 *Id.* at 1267-68.
- 110 Eventually the EEOC negotiated a successful settlement of the women’s claims with the employer. See *Order, Dinkins et al. v. Charoen Pokphand USA, Inc.*, No. 2:99-cv-00847-ID-JLC (M.D. Ala. Mar. 20, 2001).
- 111 *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657, 665-72 & nn.5 & 8 (8th Cir. 2012).
- 112 *Id.* at 665, 683-84.
- 113 Corrected Opening Brief of the Equal Employment Opportunity Commission as Appellant, *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657 (2012) (Nos. 09-3764, 09-3765, 10-1682), available at <http://www.eeoc.gov/eeoc/litigation/briefs/crst.txt>.
- 114 *Id.*
- 115 *Id.*
- 116 *Id.*
- 117 679 F.3d at 665, 684.
- 118 *Id.* at 683-84. See also *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2009 WL 1783495, at *2 n.2 (N.D. Iowa June 18, 2009).
- 119 679 F.3d at 683-85, 689-93. See also 2009 WL 1783495, at *2-5.
- 120 679 F.3d at 670-71, 691-93.
- 121 *Id.* at 683-85, 689-693. Because the EEOC lost on many of the sexual harassment claims that it brought in this case, the trial court did recently award CRST some of its attorney’s fees because it found that the EEOC’s claims were unreasonable. This was based in part on the EEOC’s failure to go through certain administrative prerequisites imposed by the law before filing a lawsuit, and problems with how the EEOC presented its arguments about what is called a “pattern or practice” claim for discrimination. *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *13 (N.D. Iowa Aug. 1 2013). It was also in part based on the court’s assertion that the EEOC should have known from prior decisions by the Eight Circuit that Lead Drivers would not be treated as supervisors under a narrow definition of that term—despite the fact that the Supreme Court did not definitively resolve the definition of supervisor until the *Vance* decision in the summer of 2013—and that for at least some of the claims the EEOC’s evidence of negligence was lacking (although the court only identified six such cases specifically). *Id.* The EEOC is currently appealing this decision. See Corrected Brief of the Equal Employment Opportunity Commission as Appellant, *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 13-3159 (8th Cir. Jan. 17, 2014), available at <http://www.workplaceclassaction.com/files/2014/01/Brief-of-16-Jan-2014-in-EEOC-v.-CRST-Van-Expedited.pdf>.
- 122 See, e.g., *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); *Whitten v. Fred’s, Inc.*, 601 F.3d 231 (4th Cir. 2010); *Rhodes v. Ill. Dep’t of Transp.*, 359 F.3d 498 (7th Cir. 2004); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003).
- 123 See, e.g., *Morehouse v. Idaho State Dep’t of Corr.*, No. 3:11-CV-00167-BLW, 2013 WL 5798702 (D. Idaho Oct. 28, 2013); *McCafferty v. Preiss Enterprises, Inc.*, 534 F. App’x 726 (10th Cir. 2013); *Marugame v. Napolitano*, No. 11-00710 LEK-BMK, 2013 WL 4608079 (D. Haw. 2013).
- 124 *McCafferty*, 534 F. App’x at 729-32.
- 125 *Id.* at 728.
- 126 *Id.*
- 127 *Id.* at 731.
- 128 *Id.* at 728. Because *McCafferty* believed that Peterson was her supervisor she only brought a supervisor harassment claim. The court held that she had therefore waived her ability to raise a coworker harassment claim. *Id.* at 729 n.1. Had the court actually considered the negligence argument in a case like *McCafferty* where the employer was horribly lax in controlling workplace conditions in order to prevent harassment, it should be clear cut that the employer was liable under these facts, even applying a negligence standard. Unfortunately, however, courts have often allowed employers to get away with egregious actions (or inactions) when they have applied a negligence standard to determine the employer’s liability for lower-level supervisor and/or coworker harassment. See, e.g., *Young v. Temple Univ. Hosp.*, 359 F. App’x 304, 309 (3d Cir. 2009) (court held that employer was not negligent in responding to coworker harassment even though employer received numerous complaints about the same individual over a period of many months and the employer’s responses to the complaints did not alter the ongoing harassing conduct); *Mullins v. Goodyear Tire & Rubber Co.*, 291 F. App’x 744, 749-750 (6th Cir. 2008) (court held that employer was not negligent in responding to coworker harassment even though the coworker’s harassing and threatening conduct continued after the plaintiff first sought a remedy from the employer and the plaintiff continued to register complaints about the harassment); *Nievaard v. City of Ann Arbor*, 124 F. App’x 948, 955 (6th Cir. 2005) (court held that the city was not negligent in responding to coworker harassment even though obstruction by the Parks Department had undermined the remedial efforts of the Human

- Resources Department and thereby allowed harassment to continue); *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 506-507 (7th Cir. 2004) (court held that employer was not negligent because it had an anti-harassment policy in place even though pornography was routinely present at the worksite and one of the individuals charged with reinforcing this policy when the plaintiff complained was her primary harasser).
- 129 Employment lawyers have already begun counseling their clients to restructure job descriptions to limit the potential for liability post-*Vance*. For example, one management lawyers' newsletter for employers recently advised to "consider strategic opportunities to capitalize on the *Vance* and *McCafferty* decisions by limiting the scope of authority that certain leaders possess in order to narrow the scope of your risk for vicarious supervisory liability. And be sure to note the limitations in the updated job descriptions, which you will use as Exhibit 'A' in establishing the leader is not a 'supervisor' for Title VII purposes. For those leaders that already lack authority to hire, fire, promote, demote, or transfer, but who have power to direct others to some extent, make sure the job descriptions for those positions clearly reflects the lack of such authority." Christopher S. Thrutchley *10th Circuit Ruling Good for Employers But . . .*, THE EMPLOYER'S LEGAL RESOURCE (Doerner, Saunders, Daniel & Anderson, Tulsa, Okla.) Sep. 9, 2013, available at <http://www.dsda.com/News-Publications/Newsletters/25514/The-Employers-Legal-Resource-10th-Circuit-Ruling-a-Good-Win-for-Employers-but>.
- 130 *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2466 (2013) (Ginsburg, J., dissenting).
- 131 Vicarious liability is a legal doctrine that assigns responsibility to a superior for the actions of his or her subordinate. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-56 (1998) (applying the principles of agency law to Title VII employer liability).
- 132 The Fair Employment Protection Act, S. 2133, H.R. 4227, 113th Cong. (2014).
- 133 *Vance*, 133 S. Ct. at 2352. See also *Kramer v. Wasatch County Sheriff's Office*, No. 12-4058, 2014 WL 702111, at *7 (10th Cir. Feb. 25, 2014) (explaining that a manager who works closely with his or her subordinates and who has power to recommend or otherwise substantially influence tangible employment actions qualifies as "supervisor" for the purposes of employer vicarious liability in harassment cases).
- 134 *Vance*, 133 S. Ct. at 2451-53. The EEOC has noted this in an explanatory note updating its "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" to reflect the Supreme Court's decision in *Vance*. See *supra* note 74.
- 135 The Fair Employment Preservation Act, SB 688, HB 1350, 434th Leg., 2d Spec. Sess. (Md. 2014).
- 136 See BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT STATISTICS, FREQUENTLY ASKED QUESTIONS, available at http://www.bls.gov/oes/oes_ques.htm#def.
- 137 James R. Elliot & Ryan A. Smith, *Race, Gender, and Workplace Power*, 69 Am. Soc. Rev. 365, 372 (2004).
- 138 The Fair Minimum Wage Act, S. 460, H.R. 1010, 113th Cong. (2013).
- 139 BUREAU OF LABOR STATISTICS, 2010 SOC USER GUIDE xiii (Feb. 2010), available at http://www.bls.gov/soc/soc_2010_user_guide.pdf.
- 140 See BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT STATISTICS, MAY 2012 OCCUPATION PROFILES, available at http://www.bls.gov/oes/current/oes_stru.htm.
- 141 See *id.*
- 142 Includes non-supervisor, non-low-wage workers. Does not include managers. See *Methodological Appendix*, Managers.



11 Dupont Circle, Suite 800
Washington, DC 20036
202.588.5180 | fax 202.588.5185
www.nwlc.org